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Bunya ak Jalong v Public Prosecutor

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COURT OF APPEAL (KUCHING) — CRIMINAL APPEAL NO Q-09–212–08 OF 2014
ABDUL WAHAB PATAIL, LINTON ALBERT AND ZAKARIA SAM JJCA
26 MAY 2015

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Criminal Law — Rape — Penetration — Girl below statutory age of consent — Accused denied having sexual intercourse with victim but said his and her fingers laden with his freshly-ejaculated semen were introduced into her vagina — DNA evidence established accused fathered victim's child — Whether trial court's finding there was penile penetration of victim wrong — Whether unrebutted evidence of specialist obstetrician and gynaecologist that victim could have conceived as result of sperm-laden fingers entering vagina supported accused's case and created reasonable doubt in prosecution's case — Whether single trial of accused on four charges of rape allegedly committed over four months within 12 month period an incurable illegality contrary to s 164 of the Criminal Procedure Code ('the CPC') — Whether trial court's finding victim credible witness based on demeanour in court flawed and unsafe as recording of her testimony bore no notation of her demeanour as required by s 271 of the CPC — Whether trial court wrong to regard accused's defence valueless following finding he was not credible witness — Whether principle in Mohamad Radhi bin Yaakob v Public Prosecutor required trial court to have objectively evaluated whether accused's defence or explanation did or did not raise reasonable doubt on prosecution's case

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The sessions court sentenced the appellant to concurrent jail terms and whipping after finding him guilty of four charges of raping a girl ('PW4'), then aged below 15 years, over the months of May, June, July and August of 2011. In February 2012, PW4 gave birth to a baby boy. DNA evidence established that the appellant, who was about 56 years old at the time of the alleged offences, was the baby's father. All the four allegations of rape were said to have taken place between 2pm and 3pm in the room of a hotel in Sibu, Sarawak. On the appellant's appeal against conviction and sentence, the High Court reduced the jail terms, ordered the terms to run consecutively and also ordered the appellant to pay compensation to PW4. The appellant's instant appeal against the High Court's decision rehashed the same issues he had raised in the courts below which were, inter alia: (a) that he never had sexual intercourse with PW4; that there was only insertion of his and her fingers, which were smeared with his semen, into her vagina; (b) that there was failure to appreciate the evidence of a specialist obstetrician and gynaecologist ('PW8') who said it was possible conception in the instant case could have occurred without sexual intercourse if fingers containing freshly-ejaculated spermatozoa had been

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introduced into the vagina; (c) that the trial was an illegality as he was tried at one trial for four separate charges of rape contrary to s 164 of the Criminal Procedure Code which permitted an accused at one trial to be charged with and tried for not more than three offences of the same kind committed within a space of 12 months; (d) that the fact the register of the hotel did not contain the names of PW4 and the appellant was fatal to the prosecution's case; and (e) that PW4 was not a credible witness and her evidence was not adequately corroborated. The trial judge found, inter alia, that: (i) PW4 was raped and that the appellant did have sexual intercourse with her; (ii) even though PW8 said it was possible for conception to have occurred without sexual intercourse if semen-laden fingers were introduced into the vagina, she had clarified that conception in that manner could not easily happen without the aid of sufficient medical equipment; (iii) from her demeanour in court, PW4 was a truthful and credible witness; her story was believable and acceptable and her allegation of rape was corroborated by the medical evidence including the DNA finding that the appellant was the father of PW4's child; and (iv) the appellant was not a credible witness and the court did not consider his evidence to be of any value in determining whether or not he had cast a reasonable doubt on the prosecution's case.

Held, allowing the appeal and setting aside the convictions and sentences:

(1) There was confirmation by the prosecution's own expert witness, PW8, in a direct answer in re-examination and accepted by the DPP, that if freshly-ejaculated semen laden with spermatozoa was introduced into the vagina by the fingers, conception could occur. Thereafter, no further evidence was adduced by the prosecution that PW8 was incorrect. No steps were taken to call a more experienced doctor to testify to explain away PW8's testimony and the court was left with only one inference; that the prosecution accepted the confirmation by PW8. It meant that even if fertilisation was less likely to be successful by means of delivery of fresh semen by fingers compared to medically-supervised insemination, it nevertheless was possible. At that point, it was purely a supposition or proposed explanation. But when the appellant testified that fingers were used to rub and introduce freshly-ejaculated semen into PW4's vagina, the possibility by such means in this case ceased to be mere supposition because there was evidence to be considered as to whether it raised a reasonable doubt (see paras 64–65, 67–68 & 76).

(2) Upon a maximum evaluation of the whole of the evidence, the supposition that fertilisation occurred in this case by the introduction or delivery of semen by fingers became a reasonable doubt. The sole basis that gave rise to the reasonable doubt had nothing to do with belief in the version of the appellant but that PW8's testimony was that the appellant's version was possible (see para 75).

(3) The trial court's finding of PW4 as credible and accepting all of her testimony and finding the appellant not credible and considering his evidence to be of no value in determining whether he had cast a reasonable doubt on the prosecution's case failed the test in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 (SC) which required a trial judge to objectively evaluate whether an accused's explanation did or did not raise a reasonable doubt as opposed to believing and accepting as true and correct the testimony of one witness against another upon a subjective finding of credibility based on observation of demeanour and dismissing the opposing version (see paras 54–55).

(4) The four rapes the appellant was charged with were offences of the same kind allegedly committed over four months within the space of 12 months. Although the alleged incidents involved the same accused, same victim, same offence and same place, they were separate offences of rape. That the charges involved the same witnesses and evidence and time and expense could be saved by the trial of the four charges together found no merit in the light of the specific provisions of s 164 of the Criminal Procedure Code ('the CPC') that an accused could be charged with and tried at one trial for not more than three offences of the same kind committed within the space of 12 months. The prosecution submitted that the charges, trial and convictions fell within s 165 of the CPC which did not limit the number of offences the appellant could be charged with and tried at one trial as the alleged rapes were 'one series of acts so connected together as to form the same transaction'. The court failed to see how the four alleged rapes over four separate months could be seen as one transaction even if it concerned the same accused, the same victim and the same place. Section 163 of the CPC provided that for every distinct offence of which a person was accused, there shall be a separate charge, and every such charge shall be tried separately except in the cases mentioned in ss 164–166 and 170. When a trial was in breach of s 163 and was not saved by ss 164 or 165, it constituted an illegality which could not be cured under s 422 of the CPC (see paras 38–41 & 44–45).

(5) The finding as to PW4's credibility based upon her demeanour from the trial judge's audio-visual advantage was flawed and unsafe. The record contained no remarks as to PW4's demeanour. The impression as to demeanour from the audio-visual advantage was something not easily capable of being scrutinised directly not only on appeal, but such impression could be affected by any delay made in assessing and noting that demeanour. Hence, s 271 of the CPC provided for it to be noted at the end of the notes as to that witness's testimony. Without such contemporaneous notation, references to demeanour to support a decision suffered from the impression of likelihood that it was more of an excuse to support the decision (see paras 56 & 59–60).

(6) The absence of the names of the appellant and PW4 in the hotel register did not have a determinative value as evidence as to whether or not they were at the hotel. The inn-keeper was not called to testify but he might have had his reasons for not registering their names (see paras 30 & 34).

(7) Steps ought to be taken quickly to add to the definition of rape. The court did not think it appropriate to consider convicting the appellant on lesser charges such as of indecent assault lest it gave the notion the courts condoned such lesser charges as sufficient charge and punishment and detracted from the urgency of introducing necessary legislation (see paras 78–79).

[Bahasa Malaysia summary

Mahkamah sesyen menjatuhkan hukuman penjara dan sebatan keatas perayu secara serentak selepas didapati bersalah terhadap empat pertuduhan merogol seorang gadis ('PW4'), pada masa itu berumur di bawah 15 tahun, pada bulan-bulan Mei, Jun, Julai dan Ogos tahun 2011. Pada Februari 2012 PW4 melahirkan seorang anak lelaki. Bukti DNA membuktikan bahawa perayu, yang berusia kira-kira 56 tahun pada masa kesalahan yang dikatakan itu, adalah bapa kepada bayi tersebut. Keempat-empat tuduhan rogol dikatakan telah berlaku antara pukul 2 petang dan 3 petang di dalam bilik sebuah hotel di Sibu, Sarawak. Atas rayuan perayu terhadap sabitan dan hukuman, Mahkamah Tinggi telah mengurangkan hukuman penjara, memerintahkan hukuman itu berjalan secara berasingan dan juga memerintahkan perayu membayar pampasan kepada PW4. Rayuan perayu ini terhadap keputusan Mahkamah Tinggi membuka semula isu-isu sama yang dibangkitkannya dalam mahkamah bawahan, antara lain: (a) bahawa dia tidak pernah mengadakan hubungan seksual dengan PW4; bahawa hanya jarinya dan jari gadis itu, yang dilumuri air maninya, ke dalam bahagian sulitnya; (b) bahawa terdapat kegagalan untuk memahami keterangan pakar obstetrisian dan pakar sakit puan ('PW8') yang mengatakan pensenyawaan dalam kes ini mungkin berlaku tanpa hubungan seksual jika jari-jari mengandungi spermatozoa yang masih baru dimasukkan ke dalam vagina; (c) bahawa perbicaraan itu menyalahi undang-undang kerana dia telah dibicarakan dalam satu perbicaraan untuk empat pertuduhan rogol yang bertentangan dengan s 164 Kanun Tatacara Jenayah yang membenarkan tertuduh dalam satu perbicaraan dituduh dengan dan dibicarakan untuk tidak melebihi tiga kesalahan yang sama dilakukan dalam tempoh 12 bulan; (d) bahawa fakta yang buku daftar hotel tidak mengandungi nama-nama PW4 dan perayu memudaratkan kes pendakwaan; dan (e) bahawa PW4 bukan saksi yang boleh dipercayai dan keterangannya tidak disokong dengan cukup. Hakim perbicaraan mendapati, antara lain, bahawa: (i) PW4 telah dirogol dan bahawa perayu telah mengadakan hubungan seksual dengannya; (ii) meskipun PW8 mengatakan ia mustahil untuk pensenyawaan berlaku tanpa hubungan seksual jika jari-jari yang penuh air mani dimasukkan ke dalam vagina, dia menjelaskan bahawa pensenyawaan

dalam cara itu tidak mudah berlaku tanpa bantuan peralatan perubatan yang mencukupi; (iii) daripada perilakunya di mahkamah, PW4 adalah saksi yang jujur dan boleh dipercayai; ceritanya boleh dipercayai dan boleh diterima dan dakwaan rogolnya telah disokong dengan keterangan perubatan termasuk penemuan DNA bahawa perayu adalah bapa kepada anak PW4; dan (iv) perayu bukan saksi yang boleh dipercayai dan mahkamah tidak mengambil kira keterangannya sebagai mempunyai apa-apa nilai untuk menentukan sama ada atau tidak dia telah menimbulkan keraguan munasabah ke atas kes pendakwaan.

Diputuskan, membenarkan rayuan dan mengetepikan sabitan dan hukuman:

(1) Terdapat pengesahan oleh saksi pakar pendakwaan sendiri, PW8, dalam menjawab secara langsung semasa pemeriksaan semula dan telah diterima oleh pendakwa raya, bahawa jika air mani yang baru dikeluarkan penuh dengan spermatozoa telah dimasukkan ke dalam vagina dengan jari, pensenyawaan boleh berlaku. Oleh demikian, tiada keterangan lanjut telah dikemukakan oleh pendakwaan bahawa PW8 adalah tidak betul. Tiada langkah diambil untuk memanggil doktor yang lebih berpengalaman untuk memberi keterangan bagi menjelaskan keterangan PW8 dan mahkamah hanya mempunyai satu inferens; yang pendakwaan telah menerima pengesahan oleh PW8. Ini bermaksud jikapun pensenyawaan tidak mungkin berjaya melalui kemasukan air mani yang baru dengan jari berbanding dengan pensenyawaan yang dilaksanakan secara perubatan, apapun ia mungkin berlaku. Oleh itu, ia semata-mata penjelasan yang diandai atau dicadangkan. Namun apabila perayu memberi keterangan bahawa jari-jari telah digunakan untuk menggosok dan memasukkan air mani yang baru ke dalam vagina PW4, kebarangkalian secara begitu dalam kes ini bukan hanya andaian kerana terdapat keterangan yang perlu diambil kira berhubung sama ada ia telah menimbulkan keraguan munasabah (lihat perenggan 64–65, 67–68 & 76).

(2) Setelah membuat penilaian maksimum terhadap keseluruhan keterangan, andaian bahawa pensenyawaan berlaku dalam kes ini melalui kemasukan atau pemindahan air mani melalui jari-jari menjadi keraguan munasabah. Satu-satunya asas yang menimbulkan keraguan munasabah tiada kaitan dengan kepercayaan dalam versi perayu tetapi bahawa keterangan PW8 adalah versi perayu itu adalah berkemungkinan (lihat perenggan 75).

(3) Penemuan mahkamah perbicaraan tentang PW4 sebagai suatu yang boleh dipercayai dan menerima semua keterangannya dan mendapati perayu tidak boleh dipercayai dan mengambil kira keterangannya sebagai tiada nilai dalam menentukan sama ada dia telah menimbulkan keraguan munasabah ke atas ke pendakwaan telah gagal sebagaimana ujian dalam

kes *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 (MA) yang menghendaki hakim perbicaraan menilai secara objektif sama ada penjelasan tertuduh telah atau tidak menimbulkan keraguan munasabah berbanding dengan mempercayai dan menerima sebagai benar keterangan satu saksi terhadap yang lain berdasarkan penemuan subjektif berhubung kebolehpercayaan berdasarkan penelitian perilaku dan menolak versi yang bertentangan (lihat perenggan 54–55).

(4) Keempat-empat pertuduhan rogol terhadap perayu adalah kesalahan-kesalahan jenis yang sama dikatakan telah dilakukan sepanjang empat bulan dalam tempoh 12 bulan. Walaupun kejadian-kejadian yang dikatakan melibatkan tertuduh yang sama, mangsa yang sama kesalahan yang sama dan tempat yang sama, ia adalah kesalahan-kesalahan rogol yang berasingan. Bahawa pertuduhan-pertuduhan itu melibatkan saksi-saksi dan keterangan yang sama dan masa dan perbelanjaan boleh dikurangkan dengan perbicaraan bersama keempat-empat pertuduhan didapati tiada merit berdasarkan peruntukan spesifik s 164 Kanun Tatacara Jenayah ('KTJ') bahawa tertuduh boleh dituduh dengan dan dibicarakan dalam satu perbicaraan untuk tidak lebih daripada tiga kesalahan yang jenis sama dilakukan dalam tempoh jangka masa 12 bulan. Pendakwaan berhujah bahawa pertuduhan-pertuduhan, perbicaraan dan pensabitan jatuh di bawah s 165 KTJ yang tidak mengehadkan bilangan kesalahan yang perayu boleh dituduh dan dibicarakan dalam satu perbicaraan kerana dakwaan-dakwaan rogol adalah 'one series of acts so connected together as to form the same transaction'. Mahkamah gagal melihat bagaimana keempat-empat dakwaan rogol sepanjang empat bulan berasingan boleh dilihat sebagai satu transaksi jikapun ia berkaitan dengan tertuduh yang sama, mangsa yang sama dan tempat yang sama. Seksyen 163 KTJ memperuntukkan bahawa setiap kesalahan berbeza di mana seseorang itu dituduh, perlu ada pertuduhan yang berasingan, dah setiap pertuduhan hendaklah dibicarakan secara berasingan kecuali dalam kes-kes yang dinyatakan dalam ss 164–166 dan 170. Apabila satu perbicaraan melanggar s 163 dan tidak dikecualikan oleh ss 164 atau 165, ia menjadi suatu yang menyalahi undang-undang yang tidak boleh dipulihkan di bawah s 422 KTJ (lihat perenggan 38–41 & 44–45).

(5) Penemuan berhubung kebolehpercayaan PW4 berdasarkan perilakunya daripada kelebihan audio visual hakim perbicaraan adalah cacat dan tidak selamat. Rekod itu tidak mengandungi apa-apa ulasan berhubung perilaku PW4. Gambaran tentang perilaku daripada kelebihan audio visual itu adalah sesuatu yang tidak mudah mampu diteliti secara langsung bukan sahaja atas rayuan, tetapi tanggapan seperti itu boleh terjejas oleh apa-apa kelewatan yang dibuat dalam menilai dan memerhatikan tingkah laku itu. Oleh itu, s 271 KTJ memperuntukkan ia perlu mengambil perhatian pada akhir nota berhubung keterangan

saksi itu. Tanpa catatan semasa itu, rujukan berhubung perilaku untuk menyokong keputusan yang dialami daripada kesan kemungkinan bahawa ia adalah lebih daripada alasan untuk menyokong keputusan itu (lihat perenggan 56 & 59–60).

(6) Ketiadaan nama-nama perayu dan PW4 dalam buku daftar hotel tidak mempunyai nilai penentu sebagai keterangan berhubung sama ada atau tidak mereka berada di hotel itu. Pemilik penginapan tidak dipanggil untuk memberi keterangan tetapi dia mungkin mempunyai sebab untuk tidak mendaftar nama-nama mereka (lihat perenggan 30 & 34).

(7) Langkah-langkah patut diambil segera untuk menambah definisi rogol. Mahkamah tidak memikirkan ia sesuai untuk mempertimbangkan untuk mensabitkan perayu dengan pertuduhan-pertuduhan lebih rendah seperti serangan tidak senonoh kerana ia akan memberi tanggapan yang mahkamah bersetuju dengan pertuduhan lebih rendah sebagai pertuduhan dan hukuman yang mencukupi dan menyimpang daripada kesegeraan memperkenalkan undang-undang yang perlu (lihat perenggan 78–79).]]]]]

Notes

For a case on penetration, see 4(2) *Mallal's Digest* (4th Ed, 2014 Reissue) para 3606.

Cases referred to

Amrita Lal Hazra & Ors v Emperor (1915) ILR 42 Cal 957, HC (distd)
Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1; [1996] 4 CLJ 597, FC (refd)
Babulal Choukhani v King Emperor AIR 1938 PC 130 (refd)
Chiu Nang Hong v PP [1965] 1 MLJ 40; [1964] 1 LNS 24, PC (refd)
Dato' Seri Anwar bin Ibrahim v PP and another appeal [2015] 2 MLJ 293; [2015] 2 CLJ 145, FC (refd)
Datuk Haji Harun bin Idris v PP [1977] 2 MLJ 155; [1976] 1 LNS 19, FC (refd)
Deepanraj Subramaniam v PP [2015] 3 CLJ 439, CA (refd)
Jagar Singh v PP [1936] 1 MLJ 92 (refd)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265; [1994] 2 CLJ 151, SC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (folld)
Lim Guan Eng v PP [1998] 3 MLJ 14; [1998] 3 CLJ 769, CA
Mohd Khir bin Toyo lwn Pendakwa Raya [2013] 4 MLJ 801; [2013] 5 CLJ 323, CA (refd)

Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Muthan v PP [1947] 1 MLJ 86 (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617; [2015] 1 CLJ 579, FC (refd)
PP v Dato' Saidin bin Thamby [2012] 3 MLJ 476; [2012] 4 CLJ 15, CA (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Ridzuan Kok bin Abdullah [1995] 2 MLJ 745; [1996] 2 CLJ 346, HC (refd)
PP v Ku Lip See [1981] 1 MLJ 258; [1980] 1 LNS 166 (refd)
Ramachandran & Anor v PP [1991] 1 MLJ 267; [1991] 1 LNS 82, CA (refd)
Romi Amora bin Amir v PP [2011] 4 MLJ 571; [2011] 1 CLJ 870, CA (refd)
Saw Tuan Cheong v PP [1946] 1 MLJ 143; [1946] 1 LNS 31 (refd)
State Public Service Commission, Sarawak v Sarjit Singh Khaira [2000] 4 MLJ 353; [2000] 4 CLJ 245, FC (refd)
Tan Boon Kean v PP [1995] 3 MLJ 514; [1995] 4 CLJ 456, FC (refd)
Tara Singh and others v PP [1949] 1 MLJ 88; [1948] 1 LNS 70 (refd)
Yap Liow Swee v PP [1937] 1 MLJ 225 (refd)

Legislation referred to

Criminal Procedure Code ss 163, 164, 165, 165(1), 166, 170, 180, 271, 402A, 422
Dangerous Drugs Act 1952 ss 6, 39B(1)(a)
Evidence Act 1950
Explosive Substances Act 1908 [IND] s 4(b)
Federal Constitution art 121(1)
Penal Code ss 376(1), (2), (2)(d)
Penal Code [IND] s 120-B

Appeal from: Criminal Appeal No SBW-425–2/11 of 2013 (High Court, Sibu)

Augustin Liom (Tang & Co) for the applicant.
Nahra bt Dollah (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Wahab Patail JCA:

[1] The appellant, Bunya ak Jalong (I/C No 541004–13–5351) appealed against the dismissal by the High Court in Sibu of his appeal against his convictions by the sessions court in Sibu and the sentences as varied by the said High Court on four charges of rape as follows:

(a) first charge: reduced to eight years' imprisonment;

(b) second charge: reduced to three years' imprisonment;

(c) third charge: reduced to two years' imprisonment; and

(d) fourth charge: reduced to two years' imprisonment.

THE CHARGES

[2] The appellant was charged, tried, convicted and sentenced before the said sessions court on the following charges:

(a) PERTUDUHAN PERTAMA Bahawa kamu, pada hujung bulan Mei tahun 2011, jam lebih kurang diantara 2.00 petang hingga 3.00 petang, bertempat di dalam sebuah bilik To-Day Hotel, No. 40 Jalan Kpg Nyabor, Sibu, di dalam Daerah Sibu, di dalam Negeri Sarawak, telah merogol Jati anak Buan (P), No. Kad Pengenalan: 960910-13-5034, oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 376 (2)(d) Kanun Keseksaan

(b) PERTUDUHAN KEDUA Bahawa kamu, dalam bulan Jun tahun 2011, jam lebih kurang diantara 2.00 petang hingga 3.00 petang, bertempat di dalam sebuah bilik To-Day Hotel, No. 40 Jalan Kpg Nyabor, Sibu, di dalam Daerah Sibu, di dalam Negeri Sarawak, telah merogol Jati anak Buan (P), No. Kad Pengenalan: 960910-135034, oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 376 (1) Kanun Keseksaan.

(c) PERTUDUHAN KETIGA Bahawa kamu, dalam bulan Julai tahun 2011, jam lebih kurang diantara 2.00 petang hingga 3.00 petang, bertempat di dalam sebuah bilik To-Day Hotel, No. 40 Jalan Kpg Nyabor, Sibu, di dalam Daerah Sibu, di dalam Negeri Sarawak, telah merogol Jati anak Buan (P), No. Kad Pengenalan: 960910-13-5034, oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 376 (1) Kanun Keseksaan.

(d) PERTUDUHAN KEEMPAT Bahawa kamu, dalam bulan Ogos tahun 2011, jam lebih kurang diantara 3.00 petang hingga 4.00 petang, bertempat di dalam sebuah bilik To-Day Hotel, No. 40 Jalan Kpg Nyabor, Sibu, di dalam Daerah Sibu, di dalam Negeri Sarawak, telah merogol Jati anak Buan (P), No. Kad Pengenalan: 960910-13-5034, oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 376 (1) Kanun Keseksaan.

[3] The Penal Code provides a punishment upon conviction of a term of imprisonment which may extend to twenty years, and of imprisonment for a term of not less than five years and not more than thirty years in the case of the offences under ss 376(1) and 376(2) respectively, and in both cases the offender shall also be liable to whipping.

A BASIC PRINCIPLES OF CRIMINAL LAW

[4] As in the case of consideration of every criminal appeal, we bear in mind the following, as should every investigator, prosecutor and member of the public.

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[5] So that the traumatic experience of any offence can be put to rest, victims of offences, persons affected directly or indirectly, and right thinking persons expect offenders to be punished. But few offences attract such utter revulsion and outrage as rape, an offence not only of a physical assault but also upon the gender and psyche of the victim, whether adult or a child. It must be a permanent blot upon the offender's character and reputation. Every right thinking person is anxious to see to it the offender is punished, that justice is served and the victim compensated.

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[6] The criminal law recognises the danger that the desire to punish an offender can result in an innocent person accused of an offence being punished. The 'Blackstone Ratio', attributed to English jurist William Blackstone, in his *Commentaries on the Laws of England* published by the Clarendon Press, Oxford between 1765–1769 is widely summed up as that 'it is better that ten guilty persons escape than that one innocent person shall suffer'.

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[7] That balancing between that offenders must be brought to justice and no innocent person shall suffer is achieved by (a) structuring of the administration of the criminal law, and (b) the standard of proof.

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[8] The administration of justice is structured as follows:

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(a) the investigators;

(b) the prosecutor; and

(c) the trial court.

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[9] The duty of the investigators is to investigate the facts and to collect all the evidence. The police as investigators are public officers. Their concern must be to investigate the facts without fear or favour, so that all wrong-doers may be brought to justice. The completed investigation, compiled in the investigation papers is referred to the public prosecutor if an offence is disclosed. A completed investigation is one that includes investigation of the defences that emerged from the investigation. This includes such gaps or weaknesses emerging from the statements of witnesses and of defences from the statement of the accused person. Such investigations may eliminate the gaps or weaknesses, and provide substance to be tested against defences when raised.

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This is important as it ensures that if charges are to be preferred, there are no gaps or weak links in the prosecution case in the way of a successful prosecution.

[10] The role of the public prosecutor is quasi-judicial. It is to:

(a) review the evidence in the investigation papers;

(b) determine if the evidence in the investigation papers proves beyond reasonable doubt that an offence had been committed; and

(c) authorise the charges upon which the accused is to be charged and punished.

[11] This quasi-judicial function is essential, because a decision to prosecute necessitates the accused to incur time and legal expense to defend himself, but for which there is no provision that he can recover costs if he is acquitted. For this reason, and to ensure there can be no doubt the decision was to prosecute and not persecute, there is the responsibility for the public prosecutor to be satisfied that there is an offence according to law and that the investigation papers contain proof beyond reasonable doubt. The notion of 'if in doubt, prosecute and leave it to the court' is not only abandonment of that quasi-judicial function in the exercise of the absolute discretion to prosecute but also exposes prosecution to falling conviction rates. If the public prosecutor itself is in doubt, what court could conceivably find an accused, defended by counsel, guilty?

[12] Ensuring that an innocent man does not run risk of being victimised or harassed by wrong exercise of powers of prosecution:

(a) there must be charge for an offence known to the law; and

(b) that the facts constituting the offence are proved to the standard of proof of 'proved beyond reasonable doubt'.

[13] If the accused pleads not guilty to the charges preferred against him, a trial is held. The purpose of the trial is to enable the trial court not only to see and hear the oral and/or documentary evidence relied upon by the prosecution and produced to the court:

(a) but also to see and hear that evidence being tested in cross-examination by or on behalf of the accused;

(b) and assisted by submissions of the parties, to conduct a maximum evaluation of the evidence to decide on the credibility of prosecution witnesses and appreciate the oral and documentary evidence in order to

A decide whether, at the end of the prosecution case, the prosecution had made out a prima facie case, and if so, to call the accused to enter upon his defence; and

(c) at the end of the defence case, to conduct a maximum evaluation upon the whole of the evidence to decide whether the prosecution had proved its case beyond reasonable doubt. In simple language, it means whether at the end of the defence case, the defence had succeeded to raise a reasonable doubt in the prima facie case made out by the prosecution at the end of this case.

C See s 180 Criminal Procedure Code ('the CPC').

[14] Ensuring that the courts do not run the risk of convicting and punishing an innocent person accused of an offence with taking away of his life, liberty and/or property:

D

(a) there must be charge for an offence known to the law; and

(b) that the facts constituting the offence are proved to the standard of proof of 'proved beyond reasonable doubt'.

E

[15] That there first must be an offence known to the law is underlined by art 121(1) of the Federal Constitution that '... the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law'. Unlike the courts of England in their common law jurisdiction, the courts in Malaysia cannot 'recognise' a law as existing and to impose it.

F

[16] In a criminal trial, the facts constituting the ingredients of the offence as charged must be proved by admissible oral and/or exhibit evidence, produced and admitted into evidence before the court. See the Evidence Act 1950. And to convict requires that the facts be so proved to the standard of proof of 'proved beyond reasonable doubt'. The accused is given a fair opportunity to (a) test the evidence adduced, and (b) to lay out the foundation of his defence to relevant prosecution witnesses, and if called to enter upon his defence, to be heard in his defence. Laying out a defence to relevant prosecution witnesses not only (a) allows the defence to be tested by the prosecution, but also (b) gives notice to the prosecution and eliminates the defence from being labelled and dismissed as an afterthought, and may thereby accord the defence just enough credibility to raise a reasonable doubt in the prosecution case.

G

H

I

[17] The burden of proof lies at all times upon the prosecution. It is firmly established that the evaluation is upon a maximum evaluation. See *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265; [1994] 2 CLJ 151; *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1; [1996] 4 CLJ 597; *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; *Public*

Prosecutor v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457; *Romi Amora bin Amir v Public Prosecutor* [2011] 4 MLJ 571; [2011] 1 CLJ 870.

[18] Section 180 of the CPC requires the prosecution to make out, upon a maximum evaluation, a prima facie case. Unless a prosecution witness recants upon his testimony or his credibility is destroyed, his testimony is taken into the consideration of whether a prima facie case has been made out, even though his testimony was challenged in cross-examination by putting to him that his testimony or any identified part thereof was untrue, incorrect or contradicted by other evidence, oral and/or documentary. If the evaluation of his answers and how he answers that determines his credibility, which may result in there being a finding there remained a gap or a reasonable doubt in the prosecution case, and which may be fatal to a conviction. Only if the court finds that the prosecution had made out a prima facie case is the accused called to enter upon his defence, where the accused is entitled to tender oral and/or exhibit evidence to provide substance to his defences and the questions put on his behalf to the prosecution witnesses. If sufficient to raise a reasonable doubt, he is entitled to be acquitted and discharged.

[19] Proof beyond reasonable doubt is therefore not driven by prejudices, emotions, feelings, outrage, demands or beliefs, but is necessarily and objectively grounded upon oral and/or exhibit evidence proving the facts constituting the offence as charged. At the end of the trial, a maximum evaluation is again conducted upon the whole of the oral and/or exhibit evidence, to consider whether the case for the defence succeeded to raise a reasonable doubt, and if so, the accused is entitled to an acquittal.

THE APPEAL BEFORE THIS COURT

[20] We reproduce below the main parts of the grounds of appeal set out by the appellant:

1 1.1 The Learned High Court Judge had failed to appreciate adequately, properly or at all the effect and impact to the case of the fact that neither the Appellant's nor PW4's name were ever registered as guest(s) in To-Day's Hotel Register, in particular, as follows: ...

1.2 The Learned High Court Judge had erred in law and in fact when she said the direct evidence of PW4 that the rape occurred in To-Day Hotel sufficiently rebutted the presumption that she and the Appellant had not been guests at the hotel or that the accused had never taken her to To-Day Hotel, when that evidence of PW4 itself would be rendered untrue by the fact which triggered the presumption ie the fact that the names of PW4 and the Appellant were not found in the Hotel Register and when the truth of what PW4

A has said was itself in issue and in question because it contradicts the Hotel Register which was a contemporary document and when the Hotel Register would show her evidence that she was taken to To-Day Hotel to be untrue.

B 1.3 The Learned High Court Judge had seriously erred in fact and in law when she held it was unnecessary to call the Inn-keeper because all they would come up with was the already known fact that 'the name of the accused was not found' in the Register when what the Inn-keeper was required to explain was why, if the accused and PW4 had been to To-Day Hotel, their names were not in the Hotel Register at all. Further, the Learned High Court Judge and the Trial Judge have both failed to consider the likelihood that the Inn-keeper, if called, will confirm the fact revealed by the Hotel Register that PW4 and the accused had never been to To-Day Hotel.

C

D 1.4 The Learned High Court Judge had erred in fact and in law in failing to hold that the prosecution had failed to rebut the statutory presumption.

1.5 The Learned High Court Judge had erred in not having sufficiently taken into account a fact favourable to the accused i.e. the absence of his and PW4's name in the Register would show the accused's version is true that he and PW4 had not been to To-Day Hotel.

E

1.6 The Learned High Court Judge and the Learned Trial Judge have both failed to appreciate that the Hotel Register would render the evidence of PW4 untrustworthy, doubtful and unreliable on a core issue at the trial.

F

1.7 Both the Learned High Court Judge and the Trial Judge have failed to take into account the fact that PW4 was unable to tell the police the name of the hotel she had been to despite the fact that the hotel's name prominently appeared and shown at its entrance and she was then already a Form 3 student and that it was only when she was taken around by the IO on a patrol around Sibu town that she pointed out a hotel ie she had to point out a hotel when she was taken for a drive around by the police. But then that Hotel Register did not contain her's or the accused's name.

G

H 2 The Learned High Court Judge had erred in law and in fact when she said it was of no consequence that the misdirection, if any, on the part of the Trial Judge in saying the defence was one of alibi and hence in deciding that a Notice of Alibi was required and that because there was no such notice it is fatal to the defence because such misdirection by the Trial Judge has led to a failure of the Trial Judge to consider invoking the presumption under S.114 of the Evidence Act and the failure to appreciate that the Hotel Register would show PW4's evidence to be untrue or is not credible and conversely that the evidence of the Appellant to be true as it is supported by the Hotel Register.

I

3 Both the Learned Trial Judge and the Learned High Court Judge on appeal have failed to appreciate adequately and properly or at all the evidence of the Dr. Nurulhuda Binti Samsudin, Obstetrics & Gynaecology Specialist (PW8) when she said that in a normal case where the woman is fertile and the man is fertile conception can occur as long as semen bearing spermatozoa is introduced into the vagina, (Q15 of cross-examination of PW8 at page 100 of AR) and when she also said there was no need in such a case for supervised medical process as in the intrauterine insemination (Q16 of cross-examination of PW8 at page 101 of AR), and the effect of that expert evidence, in particular, as follows:

(i) That such evidence would corroborate the accused's evidence and would render it not an incredible story but a reasonable and probable story;

(ii) That such evidence would provide no corroboration to PW4's evidence because it would also corroborate the accused's evidence;

(iii) That such evidence would render neutral the effect of the DNA report of the chemist because it would show that conception of the child would not necessarily be by sexual intercourse but also could be by non-sexual intercourse activity as given in evidence by the accused i.e. the insertion of the finger laden with semen bearing spermatozoa into the vagina.

3.1 Both the courts below have erred in failing to appreciate that the evidence of PW8 relating to intrauterine insemination which required medical facilities and supervision and which success rate is very low applies only to couples having difficulty in bearing a child because either one of them is infertile and is not applicable to normal couples who are fertile.

3.2 The Learned High Court Judge had erred in law and in fact when she said:

Furthermore, there simply is no evidence that the Appellant and PW4 were a fertile couple when the approach ought to have been to ask whether there was evidence that they are not normal couple and are infertile. In the absence of such evidence that they are infertile or had difficulty in bearing a child, they should have been taken as being normal couple having no difficulty in bearing a child and that such conception of a child for them could occur even with non-sexual intercourse activity which is what PW8 has said.

3.3 The Learned High Court Judge had failed to appreciate adequately or at all that the Trial Judge had erred when he said 'However, we must bear in mind that PW8 has clarified that conception without sexual intercourse is not easy as it needs medical equipment' when PW8 never said that but had said to the contrary ie in a normal case conception can occur without supervised medical process and that therefore the Trial Judge had used something which PW8 never said in finding PW4 evidence reliable and conversely in finding the accused's evidence not reliable.

4 The Learned High Court Judge had failed to appreciate adequately or at all the materiality of the absence of any finding by the Learned Trial Judge on whether the alleged offences in the 2nd, 3rd and 4th charges were with or without the consent of PW4 because this issue would go to affect the entire credibility of PW4 as a witness and whether her entire evidence can be relied on or whether it was conversely a made-up story and she being rendered an unreliable witness and further whether she had told an inherently incredible story in court when she said all the four incidents were by force and without consent and all had occurred in exactly the same manner ie a story contradicted by what she had told the IO ie, for the three incidents she had consented which led to those three charges being under S.376(1) and not under S.376(2)(d).

5 The Learned High Court Judge had erred in ruling that the misdirection on the part of the Trial Judge when he said PW4 had told of the other incidents not long after telling of the incident in August 2011 is not fatal when that finding of 'not long after' telling of the incident in August, 2011 to PW3 and PW13 formed the very basis for the Trial Judge to find PW4 a credible witness (paragraph 16 of the Ground of Decision of the Sessions Court Judge at page 369 and 340 of the AR) and that basis of the Trial Judge's finding by the misdirection does not exist in fact.

6 The Learned High Court Judge ought to have realized that the Learned Trial Judge had erred in finding that PW4 was a credible or convincing witness when ...

7 The Learned Trial Judge and the Learned High Court Judge have failed to take into account sufficiently or at all the evidence and facts which are favourable to the accused and the details of the evidence of the accused in his defence in particular; ...

8 The Learned Trial Judge and the Learned High Court Judge have failed to critically evaluate and scrutinized the entire evidence of PW4 including the fact that it is not adequately corroborated or at all and have failed to take into consideration the matters listed in paragraph 6(1)-(12) above.

9 The Learned Trial Judge and the Learned High Court Judge have failed to realize that the prosecution has failed to prove its case beyond any reasonable doubt and that the defence has raised a reasonable doubt in the prosecution case and that the defence story can reasonably and probably be true.

10 The Learned High Court Judge had erred in fact and in law in failing to find and to hold that the trial of all four (4) charges of rape together in one trial was a contravention of the mandatory prohibition of the Criminal Procedure Code and in failing to hold that the trial was a nullity particularly when dealing with the appeal against sentence she had said the offences were separate and distinct offences which therefore means they could not all be tried together in one trial.

11 The Learned High Court Judge had erred in ordering the imprisonment sentence to run consecutively when she had found that the offences were committed in the same transaction and when the trial Court had passed a concurrent sentence.

12 The sentence of whipping to a total of 11 strokes is too exercise (sic).

13 The court below had erred in ordering compensation to PW4 when it is inappropriate in the circumstances and when there was no consideration at all to the means of the accused to pay such huge compensation and where there was no proper assessment of the damages that has occurred to PW4 and when the ordering of compensation would turn the criminal court to exercise the function of a civil court. The accused ought not to be further burdened when he has been sufficiently sentenced to imprisonment and to whipping. In any case, the compensation ordered is too excessive in the circumstances.

THE ISSUES

[21] The learned deputy public prosecutor ably summed up the prolix and repetitive grounds of appeal and set out the issues as follows:

Issue 1: Whether the fact that the hotel register did not show that the accused or the victim had checked into the hotel during the material time was fatal to the prosecution case.

Issue 2: Whether PW4 was a credible witness.

Issue 3: Whether the learned High Court judge had erred when deciding that is of no consequence that the misdirection, if any, on the part of the trial judge in saying the defence was one of alibi.

Issue 4: Whether the learned trial judge and the learned High Court judge failed to appreciate the evidence of PW8 that conception without sexual intercourse could occur.

Issue 5: Whether PW4's evidence was not adequately corroborated.

Issue 6: Whether the four charges can be tried at one trial.

Issue 7: Whether the appellant had raised a reasonable doubt to the prosecution case.

[22] We proceeded to address the issues as follows with the grounds of appeal in mind.

[23] In this case, the victim, then below the age of 15 years, became pregnant and gave birth to a child on 5 February 2012 whose DNA proves conclusively that the appellant is the father. The appellant at the time of the alleged first offence was 56 years seven months. The DNA evidence that he is the father of the child of the victim then aged below 15 years provided compelling evidence that the appellant had committed the alleged rapes as charged and must be

punished as provided by law. We used the term alleged rapes for it is a fundamental principle of the criminal law that a person is deemed innocent until proven guilty.

ISSUE THREE

[24] Issue three concerned what the trial judge termed as a defence of alibi. The defence that the name of the appellant was not registered in the register of the To-Day Hotel was, in our view, incorrectly termed in this case as a defence of alibi since the subject was brought up to contradict the prosecution case in the charges that the appellant took PW4 to the To-Day Hotel and that the alleged rapes occurred there, and not purely that the appellant could not have been the rapist as alleged because he was elsewhere.

[25] The defence of alibi is about evidence that an accused was elsewhere at the time and occurrence of an alleged offence, and therefore notice must be given under s 402A of the CPC to give opportunity to the public prosecutor to verify the evidence of witnesses listed in the notice of alibi as to whether the accused had raised a reasonable doubt as to where he was.

[26] Since the High Court on appeal had accepted it was not a defence of alibi, the question now is whether the error on the part of the trial judge was material. In the light of the conclusive DNA evidence that the appellant was the father of PW4's child, whether the incidents of rape by the appellant against PW4 was in the To-Day Hotel or elsewhere pales in significance, as the primary issue is whether PW4's child is the product of the alleged rapes by the appellant. The date, time and place in a charge are to assist the accused in preparing his defence, but unless it is demonstrated an accused is prejudiced in the conduct of his defence, differences arising from approximations in dates, times and places are not, by themselves, so prejudicial as to render a conviction fatal.

ISSUE ONE, ISSUE TWO AND ISSUE FIVE

[27] Issue one, issue two and issue five are intertwined.

[28] Issue one and issue two concern the finding of credibility of the victim Jati ak Buan ('PW4') that she was raped in the To-Day Hotel at No 40 Jalan Kpg Nyabor, when the register of the To-Day Hotel which the inn-keeper is obliged by law to maintain, did not record the names of the appellant and PW4.

[29] It was submitted for the appellant that an adverse presumption ought to be drawn for the failure to call the inn-keeper to explain the absence of the names of the appellant and PW4 in the register of the To-Day Hotel.

[30] Upon consideration of issue one, we observed that whether their names were recorded or not was the act of the inn-keeper and not the appellant, and the inn-keeper may have had reasons of his own. If he had reasons for the non-registration of the appellant's and PW4's names, then the fact they were not registered does not mean they were not there. But the inn-keeper was not called. Now, while if the inn-keeper was called and the matter could be explained, the absence of evidence that the prosecution had the evidence of the inn-keeper but chose to suppress it, renders the drawing of an adverse presumption to be a judicial discretion that is not judicially exercised.

[31] In *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, it was held by the Supreme Court that:

> It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limits. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document but material document by a party in possession, or for non-production of not just any witness but an important and material witness to the case.

[32] Since an adverse inference can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence, find no error in not drawing an adverse inference. It was not shown from examination of other witnesses that such evidence was taken so that non-production can only be reasonably attributed to withholding or suppression. In the absence of an adverse presumption, the finding as to whether they were in the To-Day Hotel must necessarily be drawn from other evidence. In this case, it is that of the victim, PW4.

[33] The learned trial judge had found PW4 to be a credible witness. The credibility of PW4 was an issue before the learned trial judge, who was required and therefore entitled to find PW4 credible or not and to accept or reject her testimony in whole or any part of it. The fact that in finding PW4 credible the learned trial judge did not appear to have considered certain facts that might have a bearing upon the finding, is immaterial where the certain facts do not have a determinative effect for a finding to the contrary. A finding of credibility is distinct from a finding of the accuracy of the testimony, and testimony may be accepted in one part yet not in another, since findings of fact are arrived at upon a maximum evaluation of all the evidence adduced and admitted into evidence before the court, be it at the prosecution stage or if the defence is called, at the end of the defence case.

[34] Since for the reasons we have given earlier above that the absence of the names of the appellant and PW4 in the To-Day hotel register do not have a

A determinative value as evidence as to whether they were or were not in the To-Day Hotel, the issue does not render the reasoning in the grounds of decision defective.

B **[35]** Issue five is as to corroboration of the testimony of PW4. It is not the law that testimony of a victim or minor must necessarily be corroborated in every material particular. Indeed a trial judge may convict upon uncorroborated testimony if the trial judge, having warned himself of the danger of convicting upon uncorroborated testimony, he was nevertheless satisfied it was safe to do so on the uncorroborated testimony: see for example C *Chiu Nang Hong v Public Prosecutor* [1965] 1 MLJ 40; [1964] 1 LNS 24 (PC); *Ramachandran & Anor v Public Prosecutor* [1991] 1 MLJ 267; [1991] 1 LNS 82; *Datuk Haji bin Harun Idris v Public Prosecutor* [1977] 2 MLJ 155; [1976] 1 LNS 19; *Public Prosecutor v Dato' Saidin bin Thamby* [2012] 3 MLJ D 476; [2012] 4 CLJ 15 (CA); *Deepanraj Subramaniam v Public Prosecutor* [2015] 3 CLJ 439, (CA); *Mohd Khir bin Toyo lwn Pendakwa Raya* [2013] 4 MLJ 801; [2013] 5 CLJ 323 (CA); *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14; [1998] 3 CLJ 769 (CA).

E **[36]** The significance of the DNA evidence that the father of the child borne by PW4 cannot be under estimated. It provided conclusive evidence that the spermatozoa of the appellant fertilised the ova of PW4 within her. But as we have observed earlier above, the question is whether the fertilisation of PW4 ova by the appellant's spermatozoa was as a consequence of the alleged rapes as F charged. This brings the matter to the incidents of alleged rapes we will address in issue four and issue seven below.

ISSUE SIX

G **[37]** Issue six pertains, if it is sustainable, to the validity of the trial proceedings in respect of the four charges.

[38] Section 164 of the CPC provides that:

H 164. Three offences of the same kind within twelve months may be charged together.

(1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with and tried at one trial I for any number of them not exceeding three.

...

[39] The four offences the appellant was charged with are rapes. They are four offences of the same kind and within 12 months. The trial of the appellant

on the four charges was prohibited by s 164 which limits the number of offences of the same kind he may be charged and tried with in one trial to three, regardless whether in respect of the same person or not.

[40] It was submitted by learned deputy public prosecutor that the charges, trial and convictions fell within s 165 which does not limit the number of offences to three.

[41] Section 165(1) of the CPC provides that if in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence:

> (1) If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.
>
> ...

[42] In *Public Prosecutor v Ridzuan Kok bin Abdullah* [1995] 2 MLJ 745; [1996] 2 CLJ 346, the High Court addressed the question of joinder of two charges for offences of trafficking under s 39B(1)(a) and possession under s 6 of the Dangerous Drugs Act 1952 alleged to be committed on 25 December 1992 at about 1.45am at No 5, Jalan Rantai 5, Taman Kobena, Tampoi, in the District of Johor Bahru. Section 164 of the CPC was not referred to as the offences were not of the same kind. The High Court applied the test in *Amrita Lal Hazra & Ors v Emperor* (1915) ILR 42 Cal 957, where four accused persons were charged with an offence under s 4(b) of the Explosive Substances Act, Act VI of 1908, while all the six accused persons were charged with conspiracy under s 120-B, Indian Penal Code. It was contended that a joint trial of all these persons for the two offences charged was illegal. In dismissing the contention, it was held:

> It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily indicated: they are proximity of time, unity or proximity of place, continuity of action and community of purpose or design.

[43] We found little assistance from *Amrita Lal Hazra & Ors v Emperor* which concerned four accused persons being tried together.

[44] We observed that s 164 pertains to 'offences of the same kind ... whether in respect of the same person or not ...', while s 165 pertains to '... one series of acts so connected together as to form the same transaction more offences than one are committed by the same person ...', and both these are exceptions to s

163 which ensures that an accused is in no doubt or confusion as to the particular offence for which he is charged and tried and must defend himself against. Though the alleged incidents in this case, regardless the incidents were in different months, involve the same accused, same victim, same offence and same place, they involve separate offences of rape. That the charges involve the same witnesses and evidence, and time and expense would be saved by a trial of the four charges together, find no merit in the light of the specific provisions of s 164 that only three offences of the same kind committed within the space of twelve months may be charged and tried together, and s 165 that an accused may be charged and tried together for offences that arose from one series of acts committed by one person so connected together as to form the same transaction. We failed to see how four rapes, and over four separate months, can be seen as one transaction even if by the same accused upon the same victim and in the same place.

[45] We observed also the reference in *Public Prosecutor v Ridzuan Kok Abdullah* to *Babulal Choukhani v King Emperor* AIR 1938 PC 130 that the court must determine whether the acts were committed in the same transaction or not at the time the charge was framed and not at the end of trial. This is for the reason that s 163 of the CPC provides that for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in ss 164 , 165 , 166 and 170. Therefore, when a trial is in breach of s 163 and not saved by ss 164 or 165 of the CPC, it constituted an illegality which cannot be cured under s 422 of the CPC (see *Jagar Singh v Public Prosecutor* [1936] 1 MLJ 92, *Yap Liow Swee v Public Prosecutor* [1937] 1 MLJ 225; *Saw Tuan Cheong v Public Prosecutor* [1946] 1 MLJ 143; [1946] 1 LNS 31 and *Muthan v Public Prosecutor* [1947] 1 MLJ 86).

ISSUE FOUR AND SEVEN

[46] The police case began with a police report SIBU/002281/12 made on 5 March 2012, by Rosmiati bt Abdullah (PW3), the mother of PW4:

> Pada 05.02.12 jam lebih kurang 1330 hrs anak saya Jati ak Buan kpt: 960910-13-5034 (15 tahun) mengadu sakit perut. Lalu saya membawanya ke Hospital Sibu. Tidak lama sampai di Hospital Sibu anak saya itu telah bersalin dan melahirkan seorang bayi lelaki. Setelah disoal anak saya memberitahu Bunya ak Jalong yang telah menyebabkannya mengandung. Disebabkan itu saya membuat Laporan Polis untuk siasatan dan tindakan selanjutnya. Sekian laporan saya.

[47] The police report was made by PW3 one month after the birth of the child. PW4 told PW2, PW3 and PW13 that the rape occurred in August 2011. Later PW4 narrated three other incidents of rape to PW3 and PW13.

[48] The trial judge had at this point only set out the charges, described the number of witnesses, ingredients to be established, ruling at end of the prosecution case, calling the appellant to enter upon his defence, duty to consider whether prosecution had proved its case beyond reasonable doubt, what reasonable doubt means, and said:

> 10. At the end of trial, after having considered ill the evidence to a maximum evaluation the court was satisfied that the Prosecution has proved its case beyond reasonable doubt.

[49] We reproduce the grounds of decision of the trial judge at some length in order that it is appreciated how the trial judge arrived at his decision. After summarising briefly the testimony of PW4, the grounds of decision continued as follows (at pp 368–379 of *Rekod Rayuan Jilid* 3):

> 15 ...
>
> The evidence of PW4 was consistent even though she was vigorously cross-examined for a few days. I have no hesitation to agree with the Prosecution that to say that the victim was making up a story is totally unacceptable.
>
> ...
>
> I am satisfied that the element of penetration is sufficiently established in all the charges against the Accused. The Defence cross-examination on PW4 had not in any event dislodge the Prosecution's case.
>
> 16. Now, the question is does PW4 is a credible witness? I am satisfied that there is nothing in defence evidence can discredit the truthfulness of PW4 of being a victim of rape by the Accused.
>
> The defence disputed on the inconsistencies of the victim statement to PW2, PW3 and PW13 especially to the number of incidents narrated which is varied.
>
> There was a time where the victim only narrated of only one Incident to PW2, PW3 and PW13. However, it was not long after she narrated of only one incident that she narrated the other 3 incidents to PW3 and PW13.
>
> I agree that the inconsistency in this case is reasonable and does not affect the prosecution's case and it also does not change the fact that the accused had penetrated his penis into the victim's vagina. After all PW4 had duly explained that she was in a trauma, too embarrassed to tell the whole story and afraid of being scolded by her parents.
>
> 17. Scrutinizing the defence evidences, the accused shifted the blame on PW4 and the Accused denied of having sexual intercourse with PW4 and the Accused shifted the blame on PW4 for 'inserting her finger laden with the accused semen into her vagina'.
>
> The Accused line of defence is that the pregnancy of the victim was not due to penile penetration. The defence rely on PW8 (Dr. Nurulhuda) saying that there is possibility that conception can occur even without sexual intercourse. However, we must bear in mind that PW8 had clarified that the conception without intercourse is not easy as it needs sufficient medical equipment.

The Defence relied heavily on what purportedly transpired at the toilet of YMCA Resort between the Accused and PW4. The accused had denied any sexual intercourse with PW4 but admitted of masturbation by PW4 on the Accused on 12.06.2011 at the toilet of YMCA Resort. The Accused ejaculated with his semen smearing PW4 fingers and his own finger which later were inserted into PW4's vagina.

18. The Defence also submitted that the hotel register provided unwittingly an alibi to the Accused, that is, it shows he was not at the place where the offences were alleged to have been committed in May, June, July and August 2011.

...

19. Further, the Defence submitted that it is unsafe to find for the Prosecution solely on the evidence of PW4 without corroborative evidence.

20. Generally in Malaysia there is no specific rule of law that requires the evidence of a witness to be corroborated except in the case of the evidence of a child of tender years under section 133A of the Evidence Act.

21. However, In *PR v KU LIP SEE* [1981] 1 LNS 155, Federal Court ruled that the Court can rely on the testimony of the rape victim in convicting the accused.

...

23. In any event, for the instant case I accepted the evidence of PW4 that she was raped by the Accused and it was corroborated by the medical evidence.

The DNA report which concluded positively that the Accused Is the biological father of the infant delivered by PW4 had indeed corroborated PW4 testimonies. PW4 even cried, while giving her evidence and this is also part of corroboration.

24. In *KU LIP SEE v PP* [1982] 1 MLJ 194, the Accused was convicted on a charge of rape, the Trial Judge accepted the evidence of the victim that she was raped was corroborated by the medical evidence.

Applying the above cases, the evidence of PW4 that she was raped is corroborated by the DNA report. Apart from that PW4 positively identified the Accused as the person who had raped her. PW4 without any hesitation pointed at the Accused when she was asked to identify the person who raped her.

25. Furthermore, there was no reason to disregard the testimonies of PW4. I am satisfied that she is the witness of truth and credible witness after having had the opportunity of observing her demeanour in court.

Mindful of *KU LIP SEE V PP [supra] and SHAHMIRUL BIN SALLEH v PR [supra]*, I find that it is safe to convict the Accused in this case based on the testimonies of PW4 as well as the testimonies of the Prosecution's witnesses including the medical evidence tendered in Court.

26. Having had the privilege of listening to the evidence of PW4 and the other prosecution witnesses and having had the opportunity of observing their demeanour in court, DW1 did not come across to me as a credible witness.

I therefore do not consider DW1 evidence to be of any value in determining whether the Accused has successfully cast any reasonable doubt to the Prosecution's case.

27. 'Reasonable doubt' had been defined in the case of *PR v SAIMIN* [1971] 2 MLJ *as follows: ...*

28. In the present case, I have warned myself of the danger of convicting on uncorroborated evidence and I was ready to convict the Accused as he had failed to rebut the case for the prosecution as to his guilt and based on the credible and consistent evidence of the victim.

29. I have given full attention and consideration of the whole of the evidence led by the Prosecution and the Defence. After having considered all the evidence to a maximum evaluation, I find that the Prosecution has proved its case beyond reasonable doubt on the following conclusions:

i PW4 was raped;

ii PW4 positively identified that the Accused as the person who had raped her;

iii The Court believed and accepted the testimonies of PW4 that the Accused had sexual Intercourse with PW4;

iv that PW4 was under 16 years old at that material time;

v PW4 is a credible witness and she is the witness of truth;

vi PW4's evidence that she was raped was corroborated by medical evidence. The DNA report confirmed that the Accused is the Biological father of the infant which was delivered by PW4 on 05.02.2012;

vii PW4's consent or otherwise was immaterial as she was underage at that material time;

viii PW4's evidence that it was the accused who raped her was believed and accepted;

ix the Prosecution had proven the elements of the charge beyond reasonable doubt;

x The explanation by the Accused had not raised a reasonable doubt to the Prosecution's case;

xi The defence had failed to discredit the truthfulness of PW4 of being a victim of rape by the Accused;

xii The Prosecution's witnesses are credible witness and they are the witness of truth. The Defence had failed to dislodge the truthfulness of the evidence of the Prosecution's witnesses.

30. Based on the abovementioned conclusions, the only verdict I can arrive at in respect of the 4 charges against the Accused, is a verdict of guilty. I am also satisfied that the accused failed to raise any reasonable doubt in my mind as to his guilt.

...

[50] We observed that having briefly summarised the testimony of PW4, the trial judge stated in the grounds of decision that:

(a) the testimony of PW4 was consistent despite vigorous cross-examination over a few days;

(b) he had no hesitation to agree with the prosecution that to say PW4 was making up the story was wholly unacceptable;

(c) he was satisfied the element of penetration was sufficiently established;

(d) agreed inconsistencies in the testimony of PW4 was reasonable and did not affect the prosecution case;

(e) the appellant shifted blame on PW4;

(f) Dr Nurulhuda, the obstetrician and gynaecologist specialist ('PW8') had clarified that the conception without intercourse is not easy as it needs sufficient medical equipment;

(g) in any event, for the instant case he accepted the evidence of PW4 that she was raped by the appellant and it was corroborated by the medical evidence;

(h) the fact PW4 cried while giving evidence was also part of corroboration;

(i) satisfied that PW4 was a witness of truth and was a credible witness after having had the opportunity of observing her demeanour in court and there was no reason to disregard her testimony;

(j) having had the opportunity of observing his demeanour in court, DW1 did not come across to him as a credible witness, therefore did not consider DW1 evidence to be of any value in determining whether the appellant had successfully cast any reasonable doubt on the prosecution case; and

(k) he had warned myself of the danger of convicting on uncorroborated evidence and was ready to convict the appellant as he had failed to rebut the case for the prosecution as to his guilt and based on the credible and consistent evidence of the victim.

[51] From that the trial judge made the findings set out in para 29 of the grounds of decision.

[52] We bore in mind that there were fundamentally two versions before the trial court: that of PW4 that she was raped on four occasions, and that of the appellant that there was no penile penetration and that penetration was only by PW4's fingers. As can be seen from the grounds of decision, the trial judge was satisfied as to the credibility of PW4 as a witness, that there was corroborative medical evidence, and having warned himself of convicting upon uncorroborated evidence he was ready to convict the appellant because the

appellant had failed to rebut the case for the prosecution as to his guilt and based on the credible and consistent evidence of the victim.

[53] The grounds of decision, though replete with the legal terms and phrases, was somewhat disjointed and disconnected as to appear muddled or incoherent in its reasoning. We observed that:

(a) though the trial judge had said there was corroboration, he stated he had warned himself of the danger of convicting without corroboration; and

(b) having said so, he said it was because the appellant had failed to rebut the case for the prosecution as to his guilt and based on the credible and consistent evidence of the victim.

[54] Reading the grounds of decision, it became evident the trial judge had found from the audio visual advantage of a trial judge that:

(a) PW4 was credible and therefore accepted all of her testimony; and

(b) having had the opportunity of observing the appellant's demeanour as DW1 in court, the appellant did not come across to him as a credible witness,

therefore did not consider the appellant's evidence to be of any value in determining whether the appellant had successfully cast any reasonable doubt on the prosecution case.

[55] The case that comes to mind is *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 (SC) where it was held that even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case. The reasoning, confined to acceptance of credibility and warning as to danger of convicting without corroboration, fails the test in *Mohamad Radhi bin Yaakob v Public Prosecutor* which requires a consideration whether the appellant's explanation did or did not cast a reasonable doubt. It applies:

(a) an objective evaluation as to whether a reasonable doubt was raised,

as opposed to

(b) believing and accepting as true and correct the testimony of one witness against another upon a subjective finding of credibility based on observation of demeanour and dismissing the opposing version.

[56] The finding of credibility of PW4 necessarily results from the audio visual advantage the trial judge had of the demeanour of PW4. The record contains no record as to the demeanour of the PW4. Section 271 of the

Criminal Procedure Code provides:

> 271. Remarks as to demeanour of witness
>
> A presiding Magistrate recording the evidence of a witness may, at the conclusion of the evidence and at the foot of the notes of it, record such remarks, if any, as he thinks material respecting the demeanour of the witness while under examination.

[57] In *Tara Singh and others v Public Prosecutor* [1949] 1 MLJ 88; [1948] 1 LNS, Spenser-Wilkinson J in the Court of Criminal Appeal, said:

> It has been laid down, however, that 'an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question' (See judgment of Lord Greene, MR in *Yuill v Yuill* [1945] 1 All ER 183). This was a civil case and the principle applies with even greater force to criminal cases, especially where, as usually happens in this country, the witness is a non-European giving evidence in his native tongue through interpretation.

[58] This was followed by Yusof Abdul Rashid J, in *Public Prosecutor v Ku Lip See* [1981] 1 MLJ 258; [1980] 1 LNS 166.

[59] The impression as to demeanour from the audio visual advantage is something not easily capable of being scrutinised directly not only on appeal, but such impression may be affected from any delay made in assessing and noting that demeanour. Hence, s 271 of the Criminal Procedure Code provides for it to be noted at the end of the notes as to that witness's testimony. Without such a contemporaneous note at the end of the notes of a witness as to demeanour as a basis or reason, references to demeanour to support a decision suffers from the impression of likelihood it is more of excuse to support the decision.

[60] In the circumstances, the finding as to credibility of PW4 based upon demeanour from the audio-visual advantage of the trial judge is flawed and unsafe.

[61] In this case, Justina Lau Sie Wei ('PW1'), the medical officer in the Paediatric Department, testified the child was born at 34–35 weeks gestation. Dr Nurulhuda ('PW8') reported it was about 32 weeks gestation. It has a direct bearing as to which incident in the four charges could have resulted in the conception. The appellant alleged penetration was not by penile but by fingers penetration. The possibility of conception by insemination by delivery of semen by fingers was put to PW1, a medical officer testifying for the first time. Her answer was she had not heard of any case report of fertilisation taking place other than by sexual intercourse. In her reply, she remarked pertinently that '... If it can be done so easily then we do not need artificial fertilisation'. Given

her experience her answer that she had not heard as such is not definitive as to whether it could happen. We took it she meant that fertilisation taking place other than by sexual intercourse needs to be done in a conducive environment at the specialised medical facilities.

[62] Dr Nurulhuda ('PW8') testified in cross-examination:

Q15:	In a normal case where the woman (is) fertile and [the] man is fertile, conception can occur as long as semen b(e)aring the spermatozoa is introduced to vagina?
A:	Yes, that possible.
Q16:	You don't actually need to supervise medical process as in the intrauterine insemination if they are fertile?
A:	Possible.

[63] In re-examination, PW8 testified:

Q5:	Can the conception occur if the sperm is placed just at the mouth of the vagina?
A:	No, it must be placed within the vagina at the very least.
Q6:	How about the percentage of success in intrauterine insemination?
A:	Roughly between 4% to 16 %. Very low.
Q7:	Can this process being done without medical facilities?
A:	No.
Q8:	Refer to Q8 A No 11 of cross-examination. Can you confirm that if a freshly ejaculated semen laden with spermatozoa is introduced to the vagina by the finger inserted, could conception occur?
A:	It is possible.
DPP:	No further question.

[64] There was no other conclusion that the DPP accepted the prosecution witness's answer to re-examination question Q8. Even if the public wisdom is that other than penile penetration and introduction of semen, fertilisation occurs only by medically supervised insemination, there was confirmation by the prosecution's own expert witness, PW8, in a direct answer in re-examination and accepted by the DPP, that if a freshly ejaculated semen laden with spermatozoa is introduced to the vagina by the finger inserted conception could occur.

[65] Subsequent to this, no further evidence was adduced by the prosecution that PW8 was incorrect. We puzzled over these unusual testimony

and what it means. Evidently, it means that even if fertilisation is even less likely to be successful by means of delivery of fresh semen by fingers compared to medically supervised insemination, it nevertheless was possible.

[66] To determine whether a reasonable doubt was raised, we sought assistance from established caselaw authority. What constitutes a reasonable doubt in an objective evaluation is a precise concept. The Federal Court (see *State Public Service Commission, Sarawak v Sarjit Singh Khaira* [2000] 4 MLJ 353; [2000] 4 CLJ 248 (FC); *Tan Boon Kean v Public Prosecutor* [1995] 3 MLJ 514; [1995] 4 CLJ 456 (FC); *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293; [2015] 2 CLJ 145 (FC); *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579) and the Court of Appeal and High Courts had time and again found assistance from *Miller v Minister of Pensions* [1947] 2 All ER 372 where Denning J (as he then was), explained the proof beyond reasonable doubt standard as follows:

> Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice.

[67] We bear in mind PW8 confirmed in re-examination that fertilisation is possible by the delivery of fresh semen by fingers. At that point, although fertilisation by such means was confirmed possible by PW8, the delivery of fresh semen by fingers was purely a supposition or proposed explanation. If there was no testimony as to delivery by fingers, the ground would remain a supposition and we would have dismissed the appeal on the ground no reasonable doubt was raised.

[68] But when the appellant testified as to fingers having been used to rub and introduce freshly ejaculated semen, possibility by such means in this case was no longer mere supposition, because there was evidence to be considered as to whether it raised a reasonable doubt.

[69] Similarly, the version of the appellant when he testified, if on its own, without the confirmation of PW8 that fertilisation by such means was possible, would appear in our minds to be a supposition or proposed explanation, a fanciful possibility to deflect the course of justice. If there was nothing more, it would fail, and we would dismiss the appeal.

[70] The appellant as DW1 testified that PW4 asked for sexual intercourse with him but though he touched her vagina, he did not have intercourse because her vagina was too small, that PW4 held his organ until he ejaculated.

His hand or finger had semen after he ejaculated, and while he continued to touch her vagina she touched his semen, and they both inserted their fingers into her vagina.

[71] We examined the following cross-examination:

> Q10: And the chemist report said that you are the biological father of the baby delivered by Jati Anak Buan, what could you say?
>
> A: I disagree because I did not have sexual intercourse with Jati.

[72] In the light of the conclusiveness of the DNA that he was the biological father, we can only conclude that it was the answer of an ordinary person who did not expect that use of fingers could result in fertilisation and conception. The facts on the record is that matter came to PW3's attention only when the child was born. Even so, it was PW3 and not PW4 who lodged the police report, and that police report was made one month after the birth of the child. We concluded only it was the unexpected birth of the child that brought the matter to light. We dismissed from our minds any speculation as to what was going on.

[73] Though the appellant's version appeared to be shifting blame to PW4, we do not think the comment is necessary. It distracts from the process of a maximum evaluation on an objective basis.

[74] We remained guided by the Supreme Court in *Mohamad Radhi bin Yaakob v Public Prosecutor* where it was held:

> We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial Judge must in accordance with the principle laid down in *Mat v PP* [1963] 1 MLJ 263 ; [1963] 1 LNS 82 go one step further before convicting the accused by giving due consideration as to why the defence story though could not be believed did not raise a reasonable doubt on the prosecution case. Thus, even though a Judge does not accept or believe the accused explanation, the accused must not be convicted until the Court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case.

[75] Upon a maximum evaluation of the whole of the evidence before the court, the supposition that fertilisation occurred in this case by the introduction or delivery of semen by fingers, was no longer 'but not in the least probable', but became a reasonable doubt because to the testimony of PW8, there was the testimony of the appellant, properly having been laid out in cross-examination of the medical officers, that fingers had been so used. The confirmation by PW8 made the challenged but unshaken testimony of DW1 just is at the very least bit probable as to raise a reasonable doubt. The sole basis

that gave rise to a reasonable doubt has nothing to do with belief in the version of DW1, but that PW8's testimony is that DW1's version was possible.

CONCLUDING REMARKS

[76] Reviewing the case as a whole, it was clearly a case that the defence of the appellant was put to the prosecution witnesses. The prosecution had notice of the defence. A material prosecution witness PW8 testified that fertilisation of ova by introduction of fresh semen by fingers was possible. No steps were taken to call a more experienced doctor to give evidence to explain away the testimony of PW8. There is no excuse on the record for not obtaining expert evidence that could be called to counter it. The court is left with one inference, that the prosecution accepted the confirmation by PW8 and the result must follow.

[77] Perhaps it is never too late to observe that since the burden at all times remain upon the prosecution to prove the offence as charged to the standard of beyond reasonable doubt, no charge should be filed for prosecution unless and until the prosecution is certain it could do so. There is after all no statute of limitation to crime.

[78] Finally, rape is even more of an outrage if it results in conception. Causing conception on a woman without her consent, or a minor who cannot consent, is an assault no less than rape resulting in conception. As we mentioned orally during submissions, steps ought to be taken quickly to add to the definition of rape.

[79] We did not think it appropriate to consider convicting the appellant on lesser charges such as of indecent assault lest it lends the notion and the courts stands accused that the courts condone such lesser charges as sufficient charge and punishment, and detract from the urgency of introducing necessary legislation. No doubt the prosecution felt compelled to charge for rapes with no alternative charges for the very same reason that lesser charges are wholly inadequate.

[80] For the reasons above, we allowed the appeal and set aside the conviction and sentence passed by the trial court as varied as to the order of compensation upon appeal to the High Court.

Appeal allowed and convictions and sentences set aside.

Reported by Ashok Kumar